to "Lactobacillus" which is a bacteria found in all "VITAGEN" drinks and that "LB" is their trademark. It is quite wrong for the plaintiffs to make a claim to such a right to prevent Yakult Singapore from describing the Yakult product as a product containing lacto bacilli. "LB", meaning the lacto bacillus, is a principal beneficial ingredient in the drink. The letters "LB" are used in a purely descriptive sense and I do not see how the plaintiffs can have any exclusive rights to such abbreviation.

In my view the plaintiffs have failed to establish that the shape of the Vitagen bottle has become by use in Singapore distinctive of the plaintiffs' lactic acid drink, and that they have an exclusive right to use the letters "LB".

The plaintiffs say that many potential purchasers of the lactic acid drink will be misled if the defendants are allowed to market their lactic acid drink in the Yakult bottle into thinking that the defendants' products are a smaller sized version of the plaintiffs' lactic acid drink. The plaintiffs say that the Yakult bottles bear a substantial resemblance in all material respects to those in which the plaintiffs' lactic acid drinks are sold.

I do not agree with the submissions of the plaintiffs. There is no substantial confusing resemblance between the Yakult Singapore bottle and the Vitagen bottle. It is true that the bottle shapes are the same. Leaving aside the bottle shape there are numerous and obvious differences in the get-up and appearance as appears from a direct comparison. The word "Yakult" which is featured prominently on the Yakult Singapore bottle cannot be confused either visually or phonetically with "VITAGEN". The printing is of a different colour. The layout of the wording is different and it has a coloured foil top cap upon which the word "Yakult" appears. A purchaser who is buying a lactic acid drink will normally look carefully at the container to select the flavour of his choice and the brand of his choice and the purchaser will not be confused as to either the identity of the contents or the brands.

Yakult Singapore proposed to carry on an extensive advertising campaign in the press, radio and television in order to identify the Yakult product with Yakult Singapore which will feature the Yakult Singapore container and this will have the effect of distinguishing the plaintiffs' Vitagen product.

Because of the difference in markings, size and get up and because of the proposed advertising campaign potential purchasers will not be misled, nor will there be any confusion in the minds of the public.

The plaintiffs say that if the defendants are allowed to market the lactic acid drink in Singapore in the Yakult Singapore container the business in their lactic acid products will be damaged to an unquantifiably extent between now and the trial of this action and even if an injunction were to be granted at the trial of this action the damage may well prove to be irreparable.

The plaintiffs have not clearly shown that the damage which would be caused to them by competition from the defendants' pending trial would be irreparable in the sense of damage which cannot be ascertained with reasonable accuracy and which cannot be compensated in money. There is no question of the defendants being unable to pay damages. The plaintiffs therefore do not need the protection of an interlocutory injunction to assist them in securing their remedy.

For these reasons I dismissed the motion.

Motion dismissed.

Solicitors: *Allen & Gledhill; Donaldson & Burkinshaw.*

OVERSEAS ASSURANCE CORPORATION LTD. v. LEE TEIK TEIK

[O.C.J. (Chua J.) August 22, 1979]
[Singapore — Civil Suit No. 3648 of 1976]

Insurance — Motor insurance — Policy issued to defendant — Accident — Vehicle involved in accident driven by person not named in policy — Whether insurer could recover money already paid to third party — Road Traffic Ordinance, 1958 (F.M.), ss. 75(1)(b) and 80(1).

The plaintiffs in this case were authorised motor insurers. By a policy of insurance issued to the defendant, the plaintiffs agreed for a period of one year from November 15, 1973 to November 14, 1974, to insure the defendant and two other named drivers in respect of any liability which might be incurred by the defendant or the named drivers in respect of the death or bodily injury to any person caused by or arising out of the use on the road of a motor vehicle No. JK 9794 of which the defendant was the registered owner. On November 27, 1973, the plaintiffs delivered to the defendant in respect of the policy a Certificate of Insurance. On February 22, 1974 the said vehicle was involved in an accident in the State of Johore with one Tan. The vehicle was driven by one Balaedom who was not one of the named drivers in the policy. Tan commenced proceedings in Johore against the defendant and Balaedom for personal injuries sustained by him. On October 14, 1975 he obtained judgment against the defendant and Balaedom. On November 11, 1975, the plaintiffs paid to Tan $26,500 due under the judgment. The plaintiffs sought to recover from the defendant the said sum of $26,500.

Held, dismissing the plaintiffs' claim: (1) under section 80(1) of the Road Traffic Ordinance, 1958 (F.M.), the duty of an insurer to satisfy a third party's judgment can only arise if the terms of the policy in the first place provide adequate cover to the person insured under the policy;

(2) there never was any insurance involving liability on the part of the plaintiffs in regard to the person who was driving the motor vehicle and it must follow as a matter of law that there is nothing in section 80(1) which would make the plaintiffs liable for that which in truth they have never insured against.

Case referred to:-

(1) *Ahmad Sandara Lela Putera & Anor.* v. *Queensland Insurance Co.* [1975] 1 M.L.J. 269.

CIVIL SUIT.

C.S. Wu for the plaintiffs.

S.P. Pillai for the defendant.

Cur. Adv. Vult.

Chua J.: The plaintiffs are authorised motor insurers. By a policy of insurance dated November 27, 1973, (the policy) issued by the plaintiffs to the defendant, the plaintiffs agreed for the period of one year from November 15, 1973, to November 14, 1974, to insure the defendant and two other named drivers in respect of any liability which might be incurred by the defendant or the named drivers in respect of the

death of or bodily injury to any person caused by or arising out of the use on the road of a motor vehicle No. JK 9794 of which the defendant was the registered owner. On November 27, 1973, the plaintiffs delivered to the defendant in respect of the policy a Certificate of Insurance. On February 22, 1974, during the currency of the policy, motor vehicle No. JK 9794 was involved in an accident in the State of Johore with one Tan Yan Thong whilst it was driven by an employee of the defendant one Balaedom who was not one of the named drivers in the policy. Tan Yan Thong commenced proceedings in the Johore Bahru High Court against the defendant and Balaedom, claiming damages for the personal injuries sustained by him. On October 14, 1975, Tan Yan Thong recovered judgment against the defendant and Balaedom for $24,000 and costs fixed at $2,500. On November 11, 1975, the plaintiffs paid to Tan Yan Thong the sum of $26,500 due under the judgment. The plaintiffs now claim recovery from the defendant the said sum of $26,500.

The plaintiffs submit that by virtue of sections 75(1)(b) and 80(1) of the Malaysian Road Traffic Ordinance, 1958, (the Ordinance), the defendant being a person insured under the policy, they were statutorily liable to pay the judgment debt recovered by Tan Yan Thong against the defendant.

Section 75(1)(b) of the Ordinance reads:

"75 (1) In order to comply with the requirements of this Part of this Ordinance a policy of insurance must be a policy which —

(a) is issued by a person who is an authorised insurer within the meaning of this Part of this Ordinance; and

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road."

Section 80(1) of the Ordinance reads:

"80 (1) If, after a certificate of insurance has been delivered under sub-section (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of sub-section (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured on the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

The expression "liability covered by the terms of the policy" in section 80 is defined in section 80(5) as meaning "a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy."

The argument of counsel for the plaintiff is this. By virtue of General Exception 1(b)(ii) of the policy the plaintiffs are not liable in respect of any accident loss damage or liability caused sustained or incurred whilst the motor vehicle No. JK 9794 is being driven by or is for the purpose of being driven by him in the charge of any person other than an authorised driver. But the policy provides, *inter alia*, as follows:—

"*AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY*

Nothing in this Policy or any endorsement hereon shall affect the right of any person entitled to indemnify under this Policy or of any other person to recover an amount under or by virtue of the Legislation.

But the insured shall repay to the Corporation all sums paid by the Corporation which the Corporation would not have been liable to pay but for the said Legislation."

"Leglislation" under the policy is defined as including sections 78, 79 and 80 of the Malaysian Road Traffic Ordinance, 1958.

Counsel submits that but for the provisions of sections 75(1)(b) and section 80(1) of the Ordinance the plaintiffs would not have been liable to pay the judgment debt recovered by Tan Yan Thong against the defendant and that by virtue of their rights against the defendant under the "AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY" clause of the policy the plaintiffs are entitled to recover from the defendant the sum of $26,500 paid by them under the said judgment.

The issue in this case is whether the plaintiffs were liable under statute to pay the judgment debt recovered by Tan Yan Thong against the defendant to Tan Yan Thong.

The contractual right of the plaintiffs to be reimbursed was expressed in the policy under the clause "AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY". However, the plaintiffs' statutory liability towards third parties is limited by certain conditions and qualifications laid down in section 80 of the Ordinance. This section, imposing a statutory liability on the plaintiffs as insurers, must be construed strictly.

It is to be observed that under section 80(1) of the Ordinance, the duty of an insurer to satisfy a third party's judgment can only arise if the terms of the policy in the first place provide adequate cover to the person insured under the policy.

In the present case the plaintiffs had limited their liability by the wording of the policy. At the time of the accident the motor vehicle was driven not by any of the authorised drivers but by some other person. Clearly there never was any insurance involving liability on the part of the plaintiffs in regard to the person who was driving the motor vehicle and it must follow as a matter of law that there is nothing in section 80(1) which would make the plaintiffs liable for that which in truth they have never insured against. The definition of "liability covered by the terms of the policy" to be found in section 80(5) only deals with such matters as would justify the insurer in avoiding or cancelling a policy. In this case there is no question of avoiding or cancelling the policy; in fact there never was a policy in regard to it. The plaintiffs were not on risk in regard to this particular accident. The judgment which Tan Yan Thong obtained against the defendant was not a judgment in respect of a "liability covered by the terms of the policy" within the meaning of section 80(1) of the Ordinance (See *Ahmad Sandara Lela Putera & Anor.* v. *Queensland Insurance Co. Ltd.*[1]).

The plaintiffs' claim is dismissed with costs.

Claim dismissed.

Solicitors: *Donaldson & Burkinshaw; S.P. Pillai & Co.*